

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

381

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,251

UNITED STATES OF AMERICA,

Appellee

v.

NORMAN K. GOVAN,

Appellant

ON APPEAL FROM A CRIMINAL CONVICTION IN THE
UNITED STATES DISTRICT FOR THE DISTRICT OF
COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 2 1970

Nathan J. Paulson
CLERK

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(Appointed by this Court)

Criminal No. 1565-69

QUESTIONS PRESENTED *

1. Was it essential for the Government to prove the existence of the telephone complaint to which the Police Officers are alleged to have responded at the time of the arrest of the appellant?
2. Was there probable cause for the arrest and search of the appellant?
3. Did the arrest of the appellant take place prior to the search of the appellant by the Police Officers?

*This case has not previously been before this Court.

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District of Columbia v. Perry, D. C. App. 1966, 215 A 2d. 845

H. Bowling v. United States 1965, 350 F. 2d. 1002, 122 U. S. App.
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E. A. Canter v. United States, D. C. App. 1965, 212 A 2d 842

RECORD MATERIAL RELIED UPON BY APPELLANT

Transcript

Pages 20, 26, 20-21, 21, 21-22,
21-22, 35-36,

REFERENCE TO RULINGS

None

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee	:	
	:	
v.	:	NO. 24,251
	:	
NORMAN K. GOVAN,	:	
Appellant	:	
	:	

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a criminal conviction, after jury trial, in the United States District Court for the District of Columbia. Leave to appeal in forma pauperis has been granted. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant was accused and convicted of having possession of a dangerous weapon without a license (TR. 69-75). The Government produced two witnesses, members of the Metropolitan Police Department, both of whom testified they saw the appellant remove an unidentifiable object from his coat and throw it under an automobile. The Government contends that a pistol found by the police was the object thrown by the appellant.

Officer Charles Carlson testified that he was in No. 13 Precinct when a call came in concerning some shots being fired in the vicinity of 18th and Willard Street, near the Precinct. He nor his partner, Officer Dickerson, personally took the telephone call (TR. 20), but both went to the vicinity of 18th and Willard Street in a scout car. He and his partner approached a group of people and the appellant began to walk away from the group. Officer Carlson called to the appellant and the appellant began to run. Officer Carlson gave chase with his gun drawn. The appellant ran down Willard Street and when about fifty feet from the corner of 18th Street, he threw an object from his right coat pocket. Officer Carlson could not specifically state that the thrown object was the pistol and holster later found by his partner under an automobile. (TR. 22 through 34) No attempt was made to preserve or take fingerprints from the pistol. (TR. 31-32) Officer William Dickerson testified that he was with Officer Carlson when he gave chase after the appellant and was in the rear of Officer Carlson. He observed the appellant toss an object from his person, but could not describe what it was. He recovered a pistol and holster from under an automobile near the shop where the appellant discarded an object from his person. (TR. 31) He could not positively identify other objects seen under the same automobile. (TR. 38) He referred to these objects as: "bits of paper -- cups, you know. Something like that. I don't know. Just trash." (TR. 38)

The Government did not produce any records of the Police Department to show that a telephone complaint had been received, nor was the

testimony of the Police Officer who received the complaint offered into evidence, nor was the person who made the complaint identified in any way.

STATEMENT OF POINTS

1. The Government relied on a telephone complaint to No. 13 Police Precinct to establish probable cause for the arrest and search of appellant. The Government failed to establish by competent evidence that such a telephone complaint was received by the Police Precinct.
2. The appellant was arrested without probable cause and any incriminating evidence found on him as a result of that search was inadmissible.
3. Appellant was convicted of the crime of possession of a dangerous weapon resulting from a search made after an illegal arrest.

SUMMARY OF ARGUMENT

1. The Government was allowed to prove by hearsay testimony that the arresting Police Officers actually arrested the appellant in furtherance of a legitimate citizen's complaint.
2. Under the circumstances of this case, there was not sufficient cause for the Police Officers to make an arrest of the appellant for an infraction of the law not committed in their presence.
3. The Government failed to show that the arresting Police Officers identified themselves as Officers to the appellant, or that they were in uniform at the time of arrest of appellant. The Government further failed to produce any evidence or testimony as to why the Police Officers placed the appellant under arrest.

ARGUMENT

I. TESTIMONY OF THE POLICE OFFICERS CONCERNING TELEPHONE COMPLAINT NOT PERSONALLY RECEIVED BY THEM WAS HEARSAY AND INADMISSIBLE.

The only justification for the apprehension and arrest of the appellant was the testimony of two Police Officers, Officer Carlson and Officer Dickerson that a call was received at the Precinct complaining of shots being fired in the vicinity of 18th and Willard Street. (TR. 20).

Officer Carlson: (TR. 20):

"Well, my partner and I were in the station located in the 1600 block of V Street. I believe we were doing some paper work on another matter, and a call came in concerning some shots being fired in the vicinity of 18th and Willard Streets".

Cross Examination of Officer Carlson: (TR. 26):

"Q. Do you know who made that call?

A. No, I don't.

Q. Is there any record in the station as to whom that call would be from?

A. Well, the call was put out on the radio. I don't think there is any record as to who made the call."

From the foregoing testimony, the Government attempted to show that there had been a telephone call to the Police Precinct from a citizen complaining of shooting in the vicinity of 18th and Willard Street. It is plain from the testimony of both officers that they did not personally handle the telephone call. Appellant contends that the best evidence that there was a telephone complaint would be the records of the Police Precinct, or the testimony of the Officer taking the telephone call.

The testimony of the arresting Officers that they arrested the appellant in pursuance of a telephone complaint about which they had no personal knowledge is inadmissible as heresay, unless and until the Government proved by competent evidence that such a telephone complaint was actually received. Appellant contends that the only competent evidence of such a call would have been the testimony of the Police Officer who received the call, the Police Department written record of the call, or the person who made the call.

Furthermore, the Government not only failed to produce proper evidence that a telephone complaint had been made, it offered no evidence to identify the source of the complaint or to corroborate the complaint. In the case of Curtis v. U. S., 94 U. S. App. D. C. 297; 215 F. 2d. 324 the Court said:

"An uncorroborated tip by an informer whose identity and reliability were both unknown did not constitute cause to make an arrest."

It would seem to follow, therefore, that the unproven, uncorroborated telephone complaint from an unidentified source as in this case would not have constituted probable cause to arrest the appellant merely because he was in the vicinity of 18th and Willard Street at the time.

II. THE FAILURE OF THE APPELLANT TO OBEY THE POLICE OFFICER'S COMMAND TO HALT DID NOT JUSTIFY HIS ARREST OR SEARCH.

The evidence showed that the two Police Officers were walking toward a group of men at 18th and Willard Street at the same time the appellant was walking away from the group. Officer Carlson called to

the appellant to come back whereupon the appellant is alleged to have started running away and Officer Carlson gave chase with his weapon drawn (TR. 20-21). What grounds existed for the arrest of the appellant at that time? Officer Carlson must have intended to question him about the alleged shooting complaint for that is the reason he was on the scene. As heretofore argued, if the telephone complaint had not been properly introduced into evidence, then there was no justification for the Officer to have ordered the appellant to come back and certainly no reason to have drawn his revolver to compel his surrender.

It would appear that the appellant was arrested on a "drag net" round up of persons found in the vicinity of 18th and Willard Street on the strength of an unproven telephone complaint to the Precinct. In the case of Ellis v. U. S., 105 U. S. App., D. C. 36; 264 F. 2d. 377; Certiori denied 79 S. Ct. 1129 it was held:

"Vague and generalized descriptions do not justify 'drag net' roundup of large numbers of persons who might fit such description".

In this case we have no description of who might have fired a gun. Therefore, it is unreasonable for the Police to have arrested and searched the appellant merely because he was in the vicinity along with many other people when a shot had been heard sometime previously. The reasonableness of an arrest and search incident thereto must be determined by the reasonableness in light of circumstances of particular case. Mills v. U. S. 90 U. S. App., D. C. 365; 196 F. 2d. 600, Certiori denied 73 S. Ct. 27.

The only other reason for the arrest of the appellant which can be gleaned from the testimony of the Government witnesses is that he took flight when ordered by the Police Officer to "come back". If that be the reason, appellant submits that the record is devoid of any evidence to indicate that the flight of the appellant was suspicious or without justifiable cause. The record does not show that the arresting Officers were in uniform or that they identified themselves in any way to the appellant as Police Officers. The appellant contends that the record of this case does not show any probable cause for the Police Officers to have accosted the appellant with a drawn weapon and no reason for placing him under arrest for having disobeyed an order to stop proceeding along the sidewalk as he was doing at the time.

III. THE ARREST OF APPELLANT WAS A PRETEXT TO SEARCH FOR EVIDENCE.

It follows that since the Government failed to show by proper evidence that there was probable cause for the arrest of the appellant, his arrest was merely a pretext to search him for possession of a dangerous weapon.

Assuming the Jury was justified in finding him guilty of possession of the weapon found under an automobile, the search was conducted after the arrest of the appellant without probable cause and was therefore illegal. In the case of McKnight v. U. S., 37 U.S. App. D.C. 151; 183 F. 2d. 973, it was held that an arrest may not be used as a pretext to search for evidence. It seems obvious in this case that the Police arrested the appellant on mere suspicion, belief

or guess unsupported by properly proven facts, circumstances or credible information pointing to the guilt of the appellant. (C.J.S. Sec. 6. P. 597-598). This case is distinguishable from the case of Dickerson v. U. S., 120 A 2d. 588 where it was held that a Police Officer had justifiable grounds of arresting and searching a suspect when he had accidentally bumped into him and felt the concealed weapon of which he was later charged and convicted of carrying. In this case the arrest took place when the Police ordered the appellant to "come back" and then drew his gun and apprehended appellant. (TR. 21)

He was not arrested because he was seen to throw an object under a car. He was arrested on suspicion and then the search was made which disclosed the gun which he was convicted of carrying. The reason for appellant's arrest is clearly shown by the following testimony of Officer Carlson (TR. 21-22):

"Q. Officer Carlson during this period did there come a time that you withdrew your weapon from -- your service revolver from your holster.

A. When I was chasing the subject, I did draw my weapon, considering that the call was originally for shots being fired. I had my weapon in my hand." (underscoring supplied)

It is clear from the record that neither officer knew what the appellant is alleged to have thrown from his pocket, so that could not have been the cause of his arrest before the object had been identified as a pistol (TR. 21-22-35-36). Appellant contends that the arrest of the appellant took place when the Officer drew his service revolver and ordered the appellant to stop. Certainly

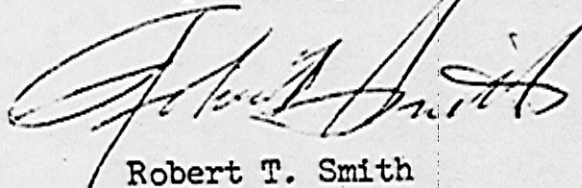
this act of the Officer restrained the liberty of the appellant and constituted an "arrest" under the law in the District of Columbia (Morton v. United States 1945, 147 F. 2d. 28, 79 U. S. App. D. C. 329 Certiori denied 65 S. Ct. 1015, 324 U. S. 875; Hanna v. The Meteor 1950, 179 F. 2d. 957; U. S. v. Willis, D. C. 1965, 248 F. Supp. 265).

The illegality of the arrest of appellant in this case is material because the evidence obtained as a result of the arrest was used to convict the appellant of the charge placed against him arising out of a search resulting from the illegal arrest. (See District of Columbia v. Perry, D. C. App. 1966, 215 A 2d. 845). The evidence clearly shows in this case that the appellant was arrested for investigation in connection with the complaint of shots in the vicinity of the place of his arrest. This arrest was illegal and took place prior to the search which turned up the evidence upon which the appellant was convicted. (See H. Bowling v. United States 1965, 350 F. 2d. 1002, 122 U. S. App. D. C. 25). As evidenced by the testimony of Officer Carlson set out hereinbefore, he arrested the appellant in connection with a complaint of shots in the neighborhood and not because he saw him throw something under an automobile. This differentiates the present case from that of (E. A. Canter v. United States, D. C. App. 1965, 212 A 2d 842) when the defendant was not arrested until after the officer observed a gun in the defendant's hand.

CONCLUSION

The conviction of the appellant was based solely on evidence obtained as the result of an illegal arrest of the appellant. The case should be reversed and a judgment of acquittal granted in favor of the appellant.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Robert T. Smith", is written over the typed name.

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

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NORMAN K. GOVAN, APPELLANT

Appeal from the United States District Court
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THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN S. RANSOM,
KENNETH MICHAEL ROBINSON,
Assistant United States Attorneys.

Cr. No. 1565-69

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED - JAN 12 1971

Nathan J. Paulson
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OTHER REFERENCES

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6 WIGMORE, EVIDENCE, §§ 1770, 1790 (3d ed. 1940)	3.4

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee the following issues are presented:

I. Did the police in responding to a phone call concerning a shooting, need to produce proof of the phone conversation or to identify the unknown caller under the hearsay doctrine?

II. Was there probable cause to chase and apprehend appellant when appellant fled upon the arrival of the police?

III. Was the recovery of the gun that appellant threw under a car a search or was it the retrieval of abandoned property?

* This case has not previously been before this Court.



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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a one-count indictment on September 23, 1969, with carrying a pistol without a license.¹ In a jury trial before the Honorable William B. Bryant on February 4, 1970, appellant was found guilty as charged. Appellant was sentenced from one to four years on April 9, 1970. This appeal followed.

At 3:00 a.m. on July 25, 1969, the phone rang at the 13th Precinct. An unknown citizen of the District of Columbia reported to the police that shots were being

¹ In violation of 22 D.C. Code § 3204.

fired in the vicinity of 18th and Willard Streets, N.W. Officers Charles T. Carlson and William B. Dickerson responded immediately in their scout car to 18th and Willard Streets and observed a group of "males" standing on the corner. One man began to walk away quickly from the police officers. Officer Carlson called him back, but he began to run north on 18th Street and then east on Willard Street. Being aware that the reason for his being there was to investigate the firing of gunshots, Officer Carlson pulled his revolver and gave chase. Fifty feet down Willard Street the fleeing man reached into his right pocket and then threw an object under a car. Carlson soon caught the man, who was subsequently identified in court as appellant, and returned him to the car. Meanwhile, Officer Dickerson, who had trailed Carlson in the chase, found a .38 caliber Smith and Wesson revolver in a holster under the car² (Tr. 20-26).

The pistol recovered had four live rounds in it and traces of what appeared to be fresh carbon on the cylinder (Tr. 32). A test firing showed the weapon to be operable (Tr. 37-38). Counsel stipulated to the absence of a license by appellant to carry a pistol (Tr. 46).

There was no defense, and the jury returned a verdict of guilty.

ARGUMENT

- I. Where the police respond to a phone call concerning a shooting, there is no requirement to produce proof of the phone conversation or to identify the unknown caller under the hearsay doctrine.

Appellant cites one case³ which deals with an uncorroborated tip by an informant, whose identity and reliability were both unknown, and applies it to the instant case to support the proposition that such an uncorrobo-

² There was also some trash under the car, but nothing else of any value (Tr. 22-23).

³ *Curtis v. United States*, 94 U.S. App. D.C. 297, 215 F.2d 324 (1954).

rated tip does not constitute probable cause to make an arrest. In legal principle appellant is correct, but in application to the facts at hand appellant is clearly in error.

A true informant's identity and reliability must be corroborated because the police rely exclusively on that person's information as the basis for an arrest. *E.g.*, *Spinelli v. United States*, 393 U.S. 410, 412-413 (1969). However, a person who calls the police and informs them of unlawful conduct or, more pertinently, the firing of a gun at 3:00 a.m. is not an "informant" in the same sense of the word. Such a person is merely advising the police of conduct which should be investigated. The call serves as nothing more than a basis for the police to respond to a scene, to investigate, and, if they see suspicious conduct or a crime committed, to inquire or make an arrest based on what they see and not on what they have heard from some concerned, conscientious citizen who previously called in a complaint to the police.

Appellant labels the phone call information as hearsay. We disagree. Such a call is not hearsay, nor is it admissible as an exception to the hearsay rule. 6 WIGMORE, EVIDENCE, 1770 (3d ed. 1940). The fact that a phone call was made is probative only to give a reason why the police responded to the scene and why Officer Carlson pulled his revolver when chasing appellant.⁴ The evidence was not introduced to prove the truth of the matter asserted; rather it was introduced to show why the police reacted as they did in this particular case.⁵ 6 WIGMORE,

⁴ Officer Carlson testified that he chased appellant with his service revolver drawn because Carlson was there in response to a call concerning a shooting. Appellant was fleeing, and Carlson, who had 15½ years' experience as a police officer, felt the need to have his revolver in hand (Tr. 21-22).

⁵ Additionally we note that there was never any hearsay objection made at trial about the contents of the phone call to the precinct. In fact, defense counsel went into the phone call on his cross-examination of Officer Carlson (Tr. 26). Appellant thus cannot now be heard to argue that the contents of the phone call were inadmissible hearsay. *Cf. California v. Green*, 399 U.S. 149 (1970).

supra at § 1790; MCCORMICK, EVIDENCE § 228 (1954). The court did not err in allowing such proof before the jury.

II. There was probable cause to chase and apprehend appellant when appellant fled upon the arrival of the police.

(Tr. 20-27)

Appellant clings to the premise that the phone call made by an unknown source to the precinct was hearsay and argues, consequently, that the police had no authority to question him. We find appellant's argument to be yet another step along the path of frivolity.

The police not only had a right to proceed to 18th and Willard Streets; they had a duty to be there in response to a report from a concerned citizen. Upon their arrival on the scene, one of the persons standing there, who turned out to be appellant, broke and ran. Officer Carlson, an experienced police officer fully aware of the purpose of his visit to 18th and Willard Street, pulled his revolver and pursued appellant. During the chase Officer Carlson saw appellant reach into his pocket and throw a bulky object under a car without breaking stride. Soon the chase was over; the quarry was cornered, and a .38 caliber revolver was found beneath the car where it had been jettisoned by appellant (Tr. 20-27). Surely the phone call, Officer Carlson's 15½ years of experience, the flight of appellant upon the arrival of the marked police scout car, and the purposeful discarding of the pistol by appellant as he fled came well within the "plastic concept" of probable cause as defined by this Court, for example, in *Bailey v. United States*, 128 U.S. App. D.C. 354, 357-358, 389 F.2d 305, 308-309 (1967).

III. The recovery of the gun that appellant threw under a car was not a search but was the retrieval of abandoned property.

(Tr. 20-38)

Appellant fled from the police before the police alighted from their scout car. Officer Carlson pursued appellant and during the chase witnessed appellant throw an object under a car. Officer Carlson subsequently caught appellant and returned him to the area of that car. Officer Dickerson found the pistol, and appellant was charged with carrying a pistol without a license (Tr. 20-38).

At no time did the police take any incriminating evidence from appellant.⁶ Rather, they gained possession of a pistol which direct and circumstantial evidence showed that appellant had abandoned during his flight. The retrieval of the pistol by Officer Dickerson involved no seizure of which appellant may complain but was instead a lawful recovery of abandoned property. *Abel v. United States*, 362 U.S. 217, 241 (1960); *Hester v. United States*, 265 U.S. 57, 58 (1924); *Keiningham v. United States*, 113 U.S. App. D.C. 295, 307 F.2d 632 (1962), cert. denied, 371 U.S. 948 (1963). This Court has repeatedly recognized that one who foresees a potential confrontation with authority and attempts to cast away damning evidence cannot then claim that the retrieval of such evidence constituted an illegal search. *Washington v. United States*, 130 U.S. App. D.C. 144, 146, 397 F.2d 705, 707 (1968); *Keiningham v. United States*, supra; *Lee v. United States*, 95 U.S. App. D.C. 156, 221 F.2d 29 (1954).

⁶ Even if appellant had not discarded the pistol, the police could certainly have patted him down and seized the pistol under the circumstances of this case. *Terry v. Ohio*, 392 U.S. 1 (1968).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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